LINDA E. SHOSTAK (CA SBN 64599)
LShostak@mofo.com
DEREK F. FORAN (CA SBN 224569)
DForan@mofo.com
NICHOLAS S. NAPOLITAN (CA SBN 251762)
NNapolitan@mofo.com
CHRISTOPHER L. ROBINSON (CA SBN 260778)
ChristopherRobinson@mofo.com
Morrison & Foerster LLP
425 Market Street
San Francisco, California 94105-2482
Telephone: 415.268.7000
Facsimile: 415.268.7522

Attorneys for Plaintiff
NATIONAL ABORTION FEDERATION (NAF)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

NATIONAL ABORTION FEDERATION (NAF),

Plaintiff,

v.

THE CENTER FOR MEDICAL PROGRESS, BIOMAX PROCUREMENT SERVICES LLC, DAVID DALEIDEN (aka "ROBERT SARKIS"), and TROY NEWMAN,

Defendants.

Case No. 3:15-cv-3522-WHO

Judge: Hon. William H. Orrick, III

NATIONAL ABORTION FEDERATION (NAF)'S REPLY IN SUPPORT OF ITS MOTION FOR PRELIMINARY INJUNCTION

Hearing Date: December 18, 2015
Hearing Time: 9:00 a.m.
Location: Courtroom 2

Date Action Filed: July 31, 2015
Trial Date:

REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. ARGUMENT 1

A. NAF Is Likely to Succeed on the Merits of Its Contract Claims. 1

1. The NDAs and Exhibitor Agreements Are Valid and Enforceable. 2

2. Defendants Waived Any First Amendment Right to Disclose Information Obtained in Violation of the Agreements. 6

3. The Agreements Are Not Voidable on Public Policy Grounds. 8

a. Defendants' Claim That Lawful Providers of Abortion Care Are "Callous" Is Specious. 9

b. Defendants' Claim That the Agreements Are Invalid Agreements to Suppress Evidence of Crime Is Legally and Factually Baseless. 11

B. NAF Is Likely to Succeed on the Merits of Its Penal Code § 632 Claims. 17

C. NAF Established a Likelihood of Irreparable Harm If Defendants Are Not Enjoined. 20

D. The Balance of Hardships Favors Maintenance of an Injunction. 23

E. The Public Interest Favors Maintenance of an Injunction Through Trial. 24

F. The Preliminary Injunction Requested Is Not Vague or Overbroad. 25

G. The Court Should Overrule Defendants' Objections to NAF's Evidence. 28

H. Defendants Are Barred by Statute From Introducing Recordings Obtained at NAF's Meetings. 29

III. CONCLUSION 30

TABLE OF AUTHORITIES

Page (s)

CASES

Alliance for the Wild Rockies v. Cottrell,
632 F.3d 1127 (9th Cir. 2011) 1

Animal Legal Defense Fund v. Otter,
No. 14-0104, 2015 WL 4623943 (D. Idaho Aug. 3, 2015) 7

Bacheller v. Maryland,
397 U.S. 564 (1970) 21

Bank of the West v. Super. Ct.,
2 Cal.4th 1254 (1992) 5

Bd. of Trs. of the Leland Stanford Junior Univ. v. Chi-Yi,
No. 13-04383, 2015 WL 5158749 (N.D. Cal. Sept. 2, 2015) 29

Bischoff v. Brittain,
No. 14-01970, 2014 WL 5106991 (E.D. Cal. Oct. 10, 2014) 12

Blasiar, Inc. v. Fireman's Fund Ins. Co.,
76 Cal. App. 4th 748 (1999) 5

Brandenburg v. Ohio,
395 U.S. 444 (1969) 21

Burton v. Sosinsky,
203 Cal. App. 3d 562 (1988) 5

CBS Outdoor LLC v. Cal. Mini Storage, LLC,
No. 14-1598, 2014 WL 5282088 (N.D. Cal. Oct. 15, 2014) 5, 6

Coast Plaza Doctors Hosp. v. Blue Cross of Cal.,
83 Cal. App. 4th 677 (2002) 4, 5

Cohen v. Cowles Media Co.,
501 U.S. 633 (1991) 7

Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills,
321 F.3d 878 (9th Cir. 2003) 30

Cox v. Louisiana,
379 U.S. 536 (1965) 21

Ctr. for Bio-Ethical Reform, Inc. v. Los Angeles Co. Sheriff Dep't,
533 F.3d 780 (9th Cir. 2008) 21

De Guere v. Universal City Studios,
56 Cal. App. 4th 482 (1997) 5

DISH Network L.L.C. v. Rios,
No. 14-2549, 2015 WL 632242 (E.D. Cal. Feb. 13, 2015) 23

DMC Closure Aversion Comm. v. Goia,
No. 14-03636, 2014 WL 4446831 (N.D. Cal. Aug. 29, 2014) 29

DVD Copy Control Ass'n, Inc. v. Bunner,
31 Cal. 4th 864 (2003) 7

Evangelista v. Inlandboatmen's Union of Pac.,
777 F.2d 1390 (9th Cir. 1985) 13

Feldman v. Allstate Ins. Co.,
322 F.3d 660 (9th Cir. 2003) 30

Flanagan v. Flanagan,
27 Cal. 4th 766 (2002) 19

Flynt Distrib. Co. v. Harvey,
734 F.2d 1389 (9th Cir. 1984) 29

Fomby-Denson v. Dep't of the Army,
247 F.3d 1366 (Fed. Cir. 2001) 11

Forsyth Cnty. v. Nationalist Movement,
505 U.S. 123 (1992) 21

Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.,
109 Cal. App. 4th 944 (2003) 5

Garcia v. Google, Inc.,
786 F.3d 733 (9th Cir. 2015) 22

Gardner Denver Drum LLC v. Goodier,
No. 06-4, 2006 WL 1005161 (W.D. Ky. Apr. 2006) 23

Hennighan v. Insphere Ins. Solutions, Inc.,
38 F. Supp. 3d 1083 (N.D. Cal. 2014) 28

ITT Telecom Prods. Corp. v. Dooley,
214 Cal. App. 3d 307 (1989) 7

Johnson v. Couturier,
572 F.3d 1067 (9th Cir. 2009) 29

Kight v. CashCall, Inc.,
200 Cal. App. 4th 1377 (2011) 18

Kyles v. Baker,
72 F. Supp. 3d 1021 (N.D. Cal. 2014) 28

Lachman v. Sperry-Sun Well Surveying Co.,
457 F.2d 850 (10th Cir. 1972) 11

Leiva-Perez v. Holder, Jr.,
640 F.3d 962 (9th Cir. 2011) 2

Leonard v. Clark,
12 F.3d 885 (9th Cir. 1993) 8

Lieberman v. KCOP Television, Inc.,
110 Cal. App. 4th 156 (2003) 18

Marsh v. Zaazoom Solutions, LLC,
No. 11-05226, 2012 WL 952226 (N.D. Cal. Mar. 20, 2012) 27

Meyers v. Guarantee Sav. & Loan Assn.,
79 Cal. App. 3d 307 (1978) 5

Mostovoy v. Sec'y of HHS,
No. 02-10V, 2013 WL 3368236 (Fed. Cl. June 12, 2013) 16

Nat'l Abortion Fed'n v. Ctr. for Med. Progress,
Case No. 15-17318 (9th Cir. Dec. 3, 2015) 16

Oakland Tribune, Inc. v. Chronicle Pub. Co., Inc.,
762 F.2d 1374 (9th Cir. 1985) 12

Ohno v. Yasuma,
723 F.3d 984 (9th Cir. 2013) 7

Or. State Pub. Interest Research Group v. Pac. Coast Seafoods Co.,
374 F. Supp. 2d 902 (D. Or. 2005) 23

Palmer v. Truck Ins. Exch.,
21 Cal. 4th 1109 (1999) 4

Pappan Enterprises, Inc. v. Hardee's Food Systems, Inc.,
143 F.3d 800 (3d Cir. 1998) 23

People ex rel. Babbitt v. Herndon,
581 P.2d 688 (Ariz. 1978) 26

People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.,
107 Cal. App. 4th 516 (2003) 4

Perricone v. Perricone,
292 Conn. 187 (2009) 7

Regents of Univ. of Cal. v. Am. Broad. Cos., Inc.,
747 F.2d 511 (9th Cir. 1984)..... 21

Sanchez v. Cnty. of San Bernardino,
176 Cal. App. 4th 516 (2009) 3

Sanders v. Am. Broadcasting Cos.,
20 Cal. 4th 907 (1999) 17, 18, 19

Standiford v. Standiford,
89 Md. App. 326, 598 A.2d 495 (1991)..... 29

State ex rel. Corbin v. Goodrich,
151 Ariz. 118 (Ariz. Ct. App. 1986) 26

StemExpress LLC v. Center for Medical Progress et al.,
LA Super. Ct. No. BC589143 (Aug. 21, 2015) 12

Tompkins v. Cyr,
995 F. Supp. 664 (N.D. Tex. 1998)..... 22

United States v. Marine Shale Processors,
81 F.3d 1329 (5th Cir. 1996)..... 23

Univ. of Texas v. Camenisch,
451 U.S. 390 (1981)..... 29

Vringo, Inc. v. ZTE Corp.,
No. 14-4988, 2015 WL 3498634 (S.D.N.Y. June 3, 2015) 11, 25

Zoom Elec., Inc. v. Int'l Broth. Of Elec. Workers, Local 595,
2013 WL 192515 (N.D. Cal. Jan. 17, 2013) 13

STATUTES

18 U.S.C.
§ 2511 30
§ 2515 30

28 U.S.C.
§ 1746 29

42 U.S.C.
§ 289g-1 13
§ 289g-2 13

Cal. Civ. Code
§ 3427 9

Cal. Gov. Code
§ 6215 9
§ 6218 9
§ 6254.28 9

Cal. Penal Code
§ 423 9
§ 632 ..... *passim*
§ 637.2 18

Md. Code Ann., Cts. & Jud. Proc. § 10-405 29

RULES

Local Rules
Rule 7-3(a) 28
Rule 7-5 13
Rule 7-5(b) 13

OTHER AUTHORITIES

Fed. R. Civ. P. 65(d)(2) 19

Restatement (Second) of Contracts,
§ 178 ..... 3, 9
§ 307 27

I. INTRODUCTION

As NAF set out in its opening brief, this Court should issue a preliminary injunction because there is overwhelming, unrebutted evidence that Defendants fraudulently misrepresented themselves, deliberately violated agreements designed to protect physicians from harm, and violated clear statutory law when they surreptitiously recorded over 500 hours of material from NAF's annual meetings. The events of recent weeks confirm what NAF has already established: That its members will be irreparably harmed if Defendants are permitted to proceed with their averred course of smearing NAF and its members with their illegally obtained material.

More than four months into this case, Defendants still cannot legitimately justify their blatantly unlawful conduct. Despite 60 pages of effort, Defendants utterly fail to find a loophole in the plain language of NAF's deliberately broad confidentiality agreements, nor can they find a way around the statutes that plainly prohibit their illegal recording spree. They still present no factual or legal basis for their repeated assertion that "[t]he National Abortion Federation is a criminal enterprise," relying instead on the self-appointed "expert" David Daleiden's conclusory assertion that NAF and its members welcomed a "business model" that was "plainly illegal." Defendants' only response to NAF's showing of direct and irreparable harm is to trivialize it cynically, as the work of mere "hecklers" making "hyperbolic comments." Ultimately, Defendants' arguments boil down to their view that the First Amendment gives them an absolute right to do and say whatever they want, no matter what agreements and statutes they violated to obtain their illegal recordings. But they fail to distinguish their conduct from settled law holding that confidentiality agreements are enforceable over First Amendment objections. This Court should accordingly order Defendants to comply with their commitments—and with statutory law that forbids their illegal recording campaign—during the pendency of this action.

II. ARGUMENT

A. NAF Is Likely to Succeed on the Merits of Its Contract Claims.

In its opening brief, NAF made a clear showing that it was "likely to succeed on the merits" of its contract claims. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). That showing was supported by overwhelming evidence, including the 504 hours of

surreptitious recordings made at NAF's meetings, the executed Exhibitor Agreements and NDAs, David Daleiden's admissions, and CMP's corporate records. (NAF's Mot. for Prelim. Inj., Dkt. No. 228-4 ("Mot.") at 16-22.) NAF has therefore shown a "reasonable probability" or "fair prospect" of succeeding on its claims. *Leiva-Perez v. Holder, Jr.*, 640 F.3d 962, 967-68 (9th Cir. 2011).

1. The NDAs and Exhibitor Agreements Are Valid and Enforceable.

Defendants' primary argument is that the Exhibitor Agreements and NDAs are unenforceable. They cite no authority (because none exists) for the proposition that a fake and fraudulent company that enters into a confidentiality agreement, through agents acting under false names and false pretenses, may avoid its obligations and set aside the agreement as unenforceable. Beyond that, Defendants' arguments concerning the enforceability of the agreements they knowingly entered into are meritless.

First, Defendants claim that the NDAs that the Biomax agents signed at registration for NAF's annual meetings in 2014 and 2015 are "not supported by consideration." (Defs.' Opp'n to Pl.'s Mot. for Prelim. Inj., Dkt. No. 265-1 ("Opp'n") at 19.) This is so, they claim, because the executed Exhibitor Agreements already gave them "the right to enter the NAF meetings" and therefore "NAF already had a legal obligation to permit them to access the NAF meetings." (*Id.*)[1] This argument ignores the plain language of the Exhibitor Agreements, which states that the signor will be subject to additional requirements to gain access to NAFs meetings. In particular, the Exhibitor Agreements state that, as a condition of gaining access to NAF meetings, Exhibitors "shall fully comply with all . . . further rules and regulations NAF adopts." (App'x Ex. 3 ¶¶ 8, 9.)[2] This includes going through the meeting registration process, and obtaining and wearing an identifying name badge. (*Id.* ¶ 8.) The "rules and regulations NAF adopts" also include the rule "that all people attending its conferences (Attendees) sign [a] confidentiality agreement." (App'x

[1] This argument necessarily concedes that the Exhibitor Agreements are valid and enforceable.

[2] Throughout this brief, NAF relies both on the evidence attached to the Appendix of Exhibits (Dkt. No. 225-3) ("App'x"), and to NAF's concurrently filed Supplement Appendix of Exhibits ("Supp. App'x").

Ex. 5.)

Second, Defendants argue that NAF cannot show a likelihood of success on its claim that Defendants violated the provision in the Exhibitor Agreement that required Biomax to "represent [its] businesses, products, and/or services truthfully [and] accurately." (App'x Ex. 3 ¶ 15.) This is not a serious argument. Defendants concede in the same brief that Biomax "was not what NAF thought it was," that it "conceal[ed] [its] true purpose" by creating a "new identity" and used "props and costumes" to gain access to NAF's meetings. (Opp'n at 1-2.) Defendants also claim that the only remedy for a violation of this provision is cancellation of the Exhibitor Agreement. (Opp'n at 21.) Once again, this ignores the agreements' clear terms, which state that "the remedy for any breach" is "specific performance and injunctive relief" (which "shall not be deemed exclusive"). (App'x Ex. 3 ¶ 18.)

Third, Defendants claim that the confidentiality provisions in the Exhibitor Agreements are "ambiguous, irrational, contradictory, and unenforceable." (Opp'n at 21.) The premise of this argument (which Defendants fail to support with California law) is that "broadly defined" confidentiality agreements are disfavored. (*Id.* at 21.) Defendants reason from this incorrect premise that the agreements are "poorly suited," "grossly overbroad," "irrational," "imprecise," and therefore they must be construed "narrowly." (*Id*. at 22, 25.)

These claims are meritless. California courts routinely enforce confidentiality agreements broader than the type at issue to protect important privacy interests. *See e.g., Sanchez v. Cnty. of San Bernardino*, 176 Cal. App. 4th 516, 518, 527 (2009) (upholding provision that prohibits disclosure of all "facts, events and issues which gave rise to this Agreement" because the "broad, general public policy in favor of privacy" favored enforcement). There are especially compelling policy reasons to uphold the agreements here, given the interests they were designed to protect and the California legislature's repeatedly expressed concern for the privacy, safety and security of physicians who provide abortion care. *See* Cal. Gov. Code § 6215(a) (abortion providers "are often subject to harassment, threats, and acts of violence"); Restatement (Second) of Contracts § 178(3)(a) ("the strength of [a] policy as manifested by legislation and judicial decisions" is relevant to policy analysis). Defendants' arguments would stand these principles on their head.

Contrary to Defendants' assertions, the agreements are plain on their face. Under California law, the Court is "bound to give effect to the plain and ordinary meaning of the language used by the parties." *Coast Plaza Doctors Hosp. v. Blue Cross of Cal.*, 83 Cal. App. 4th 677, 684 (2002). Court's "must give a reasonable and commonsense interpretation of a contract consistent with the parties' apparent intent." *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 107 Cal. App. 4th 516, 526 (2003) (quotation omitted). Moreover, the "mere fact that a word or phrase in a [contract] may have multiple meanings does not create an ambiguity." *Palmer v. Truck Ins. Exch.*, 21 Cal. 4th 1109, 1118 (1999).

Paragraph 17 of the Exhibitor Agreement provides in full:

> In connection with NAF's Annual Meeting, Exhibitor understands that any information NAF may furnish is confidential and not available to the public. Exhibitor agrees that all written information provided by NAF, ***or any information which is disclosed orally or visually to Exhibitor, or any other exhibitor or attendee***, will be used solely in conjunction with Exhibitor's business and will be made available only to Exhibitor's officers, employees, and agents. Unless authorized in writing by NAF, ***all information is confidential*** and should not be disclosed to any other individual or third parties.

(Ex. 3 ¶ 17 (emphasis added).) Immediately before the signature block, the Exhibitor Agreement provides:

> I also agree to hold in trust and confidence ***any confidential information received in the course of exhibiting at the NAF Annual Meeting*** and agree not to reproduce or disclose confidential information without express permission from NAF. Violation of this paragraph could result in civil and/or criminal penalties.

(*Id*. (emphasis added).) This language is unambiguous. If you come to NAF's meetings as an Exhibitor, you expressly promise, as a condition of entry, to keep "any information disclosed orally or visually to Exhibitor" confidential, and also "agree to hold in trust and confidence any confidential information received in the course of exhibiting at the NAF Annual Meeting." (*Id.*) The "plain and ordinary meaning of the language used" in this agreement is that "any" information means "any" information. *Coast Plaza Drs. Hosp. v. Blue Cross of Cal.*, 83 Cal.App.4th 677, 684 (2000) (the term "any problem" is "both clear and plain. It is also very broad. In interpreting an unambiguous contractual provision we are bound to give effect to the

plain and ordinary meaning of the language used by the parties" (citing *Bank of the West v. Super. Ct.*, 2 Cal.4th 1254, 1264 (1992)). If this language seems broad, it is not because it is "imprecise." It is because it is intended to create broad nondisclosure obligations *Id.*

In contrast, Defendants' interpretation reads critical language out of the contracts—language that was designed to protect NAF members from the precise conduct that Defendants engaged in. *See Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.*, 109 Cal. App. 4th 944, 957 (2003) ("An interpretation rendering contract language nugatory or inoperative is disfavored."); *CBS Outdoor LLC v. Cal. Mini Storage, LLC*, No. 14-1598, 2014 WL 5282088, at *3 (N.D. Cal. Oct. 15, 2014) (same).[3]

Fourth, Defendants characterize the Exhibitor Agreements as "contracts of adhesion," which should be "construed against NAF and in favor of Defendants" because NAF had "superior bargaining power." (Opp'n at 25-26.) The Court should reject this appeal to its equitable discretion. *See De Guere v. Universal City Studios*, 56 Cal. App. 4th 482, 501 (1997) ("[t]he question of whether a particular contract is one of adhesion and, if so, whether it is enforceable, are equitable issues to be resolved by the trial court"). Defendants cannot enter a contract in bad faith, and then appeal to this Court's equitable discretion for leniency in the application of its plain terms. *See Burton v. Sosinsky*, 203 Cal. App. 3d 562, 573 (1988) ("a court will neither aid in the commission of a fraud . . . nor relieve one of two parties to a fraud from its consequences"). In any event, the agreements are clear on their face—there is no "ambiguity" to interpret "against NAF." *Meyers v. Guarantee Sav. & Loan Assn.*, 79 Cal. App. 3d 307, 312 (1978) (characterizing contract as "an adhesion contract" is "of no avail" where defendant "read and understood" the contract).

Last, Defendants argue that the Exhibitor Agreements should be construed to "at most"

[3] As for Defendants' hypothetical concerns that the contracts might hamper the interests of legitimate attendees, these arguments have no application whatsoever to the facts of this case. *Blasiar, Inc. v. Fireman's Fund Ins. Co.*, 76 Cal. App. 4th 748, 754-755 (1999) (refusing to find contract ambiguous based on "a hypothetical ambiguity unrelated to the facts of this case" because "[l]anguage in a contract must be construed . . . in the circumstances of that case, and cannot be found to be ambiguous in the abstract" (citation omitted)).

apply to "information provided by NAF itself, not by conference attendees in informal conversations." (Opp'n at 26.) Once again, Defendants ignore the plain language of the agreements, which expressly require them to keep "any information which is disclosed orally or visually to Exhibitor, or any other exhibitor or attendee" confidential, and to "agree to hold in trust and confidence any confidential information received in the course of exhibiting at the NAF Annual Meeting." (App'x Ex. 3 ¶ 17.) In focusing exclusively on provisions concerning "information NAF may furnish" (*id.*), Defendants impermissibly read out of the contracts the foregoing promises and obligations. *CBS Outdoor LLC*, 2014 WL 5282088, at *3 ("The Court must not interpret contracts in a way that renders some clauses nugatory, inoperative or meaningless.").

Moreover, Defendants completely ignore language in the NDAs that reinforce (and independently support) the broad confidentiality obligations that serve as a precondition to gaining entry into NAF's meetings. Attendees must keep confidential "all information distributed or otherwise made available at this conference by NAF or any conference participants through all written materials, discussions, workshops, or other means." (App'x Ex. 5 ¶ 2.) Contrary to the lawyer arguments now being made to the Court, [redacted]

2. Defendants Waived Any First Amendment Right to Disclose Information Obtained in Violation of the Agreements.

In its opening brief, NAF demonstrated that Defendants knowingly and voluntarily waived any "right" to fraudulently gain access to NAF's meetings, tape its members and later publish those tapes. (Mot. at 17-19.) Specifically, NAF analyzed each of the factors this Court identified as relevant to a waiver analysis: "what information defendants obtained," "the circumstances in which the confidentiality agreements were signed," the "reasonableness of various expectations," "the intent of both parties," and the evidence that shows how each factor points to a knowing and voluntary (indeed fraudulent) waiver. (*Id.*)

In response, Defendants repeat their "prior restraint" essay from earlier briefs and then claim that the Court's TRO and any Preliminary Injunction would constitute an unconstitutional restraint. (Opp'n at 32-35.) Defendants claim that they were engaging in "lawful political speech," and that "NAF's novel theory" would have a "devastating impact upon freedoms of speech and the press." (*Id.*)[4] This argument ignores, as it always has, black letter law that "the first amendment does not confer on the press a constitutional right to disregard promises that would otherwise be enforced under state law." *Cohen v. Cowles Media Co.*, 501 U.S. 633, 672 (1991). "[P]rivate parties who voluntarily enter into an agreement to restrict their own speech thereby waive their first amendment rights." *Perricone v. Perricone*, 292 Conn. 187, 202 (2009). The cases on this point are legion, and Defendants cite to nothing that would distinguish their conduct from cases finding such a waiver. *See id.* at 204 ("The defendant has not cited, however, and our research has not revealed, a single case in which a court has held that a judicial restraining order that enforces an agreement restricting speech between private parties constitutes a per se violation of the first amendment's prohibition on prior restraints on speech."); *DVD Copy Control Ass'n, Inc. v. Bunner*, 31 Cal. 4th 864, 873, 887 (2003) (rejecting First Amendment challenge to injunction because defendants obtained information in violation of license agreement); *Ohno v. Yasuma*, 723 F.3d 984, 999 & n.16 (9th Cir. 2013) (collecting cases that "enforce restrictions on speech arising from domestic contracts that could not have been enacted into law due to the First Amendment"); *ITT Telecom Prods. Corp. v. Dooley*, 214 Cal. App. 3d 307, 317, 319 (1989) (parties may "waive even First Amendment speech rights by contract" by entering into "an express contract of confidentiality or nondisclosure").

Thus, what was true at the outset of this case remains true today: Defendants cannot cite a single case in which a court found a prior restraint where, as here, a party gains access to

[4] Defendants' reliance on *Animal Legal Defense Fund v. Otter*, No. 14-0104, 2015 WL 4623943 (D. Idaho Aug. 3, 2015) is woefully misplaced. That case concerned a facial challenge to a state criminal statute making it a felony to take undercover videos at agricultural facilities, which the district court found to be a content-based restriction that contravened the First Amendment and Equal Protection Clause. The decision has no relevance to Defendants' criminal and fraudulent activity, and it expressly avoided addressing cases, like this one, that are based on laws of general applicability like prohibitions against fraud, theft, and contract law. *Id.* at *4.

confidential information by false pretenses, promises to keep that information confidential, and agrees that breach of his agreement would subject him to injunctive relief. (*See* Dkt. No. 27 at 2:21-26 (noting that "Defendants' counsel candidly agreed" that he knew of no such case).)

As to the waiver issue, Defendants fail to mention (let alone analyze) the factors this Court identified as relevant to a waiver analysis, and otherwise have little to say. First, they claim that the "purported non-disclosure provisions of NAF's contracts" are "ambiguous and unclear" and that Daleiden found the language "confusing." (Opp'n at 36-37.) Not only is this argument wrong for the reasons discussed above, it boggles the mind that someone could claim that the phrase "[a]ttendees are prohibited from making video, audio, photographic, or other recordings of the meetings or discussions at this conference" (App'x Ex. 5 ¶ 2) is "confusing." Second, Defendants claim that the contracts are "contracts of adhesion" and therefore they should be interpreted against NAF, "the party of superior bargaining strength." (Opp'n at 37.) This frivolous argument requires no further response in light of Defendants' admitted fraud upon NAF. Third, and most remarkably, Defendants claim that Daleiden "did not believe" that the contract constituted "an enforceable waiver of constitutional rights." (Opp'n at 37.) Daleiden's subjective beliefs concerning the enforceability of the confidentiality agreements are irrelevant. *Leonard v. Clark*, 12 F.3d 885, 890 (9th Cir. 1993). Defendants do not distinguish the on-point authority that explicitly rejects Defendants' argument. (Mot. at 18-19.)

NAF's detailed evidentiary showing of waiver in light of the factors identified by this Court as relevant to the analysis is unrebutted. Accordingly, NAF has established a knowing, voluntary, and intelligent waiver. *See Leonard*, 12 F.3d at 890.

3. The Agreements Are Not Voidable on Public Policy Grounds.

Alternatively, Defendants claim that the agreements at issue are unenforceable as a matter of public policy. Defendants offer two arguments for this point, neither of which holds water.[5]

[5] Although NAF addresses the arguments regarding clips cited by Defendants, these clips are inadmissible because Defendants violated Cal. Penal Code § 632, as explained in Part II.H, *infra*.

a. Defendants' Claim That Lawful Providers of Abortion Care Are "Callous" Is Specious.

Defendants claim that the agreements should not be enforced because doing so would "prevent Defendants from speaking publicly on matters of enormous public interest and importance." (Opp'n at 52.) The only matter that is supposedly of "enormous public interest" that Defendants identify is a set of seven clips that they assert show "members of the abortion industry discussing the harvesting of fetal organs in moments of great candor . . . revealing a disturbingly callous attitude toward highly developed human fetuses." (*Id.*)

This outrageous claim, which is a continuation of Defendants' smear campaign against NAF's members, has no basis in law. There is no "abortion doctors are callous" exception to the enforcement of contracts. Instead, a contract is only unenforceable if "the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms." Restatement (Second) of Contracts, § 178(1). In weighing the interest in enforcing a contract, courts consider: "(a) the parties justified expectations, (b) any forfeiture that would result if enforcement were denied, and (c) any special public interest in the enforcement of the particular term." *Id*. § 178(2). In weighing the interest against enforcement in light of a public policy, courts consider "(a) the strength of that policy as manifested by legislation or judicial decisions, (b) the likelihood that a refusal to enforce the term will further that policy, (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and (d) the directness of the connection between that misconduct and the term." *Id.*

Each of these factors weighs in favor of enforcing NAF's agreements. There is no recognized public policy against confidentiality or nondisclosure agreements. In contrast, time and again, the California legislature has acknowledged that the public policy of this state favors protecting abortion providers, who put their own privacy and safety at risk to ensure the constitutional rights of others, and who "are often subject to harassment, threats, and acts of violence." Cal. Gov. Code § 6215(a). Multiple laws have therefore been enacted for their benefit. *See* Cal. Civ. Code § 3427 *et seq.*; Cal. Gov. Code § 6218 *et seq.*; Cal. Gov. Code § 6254.28; Cal. Penal Code § 423 *et seq.* Beyond that, to declare NAF's confidentiality agreements

unenforceable would be effectively to declare open season on its members, and render them helpless against further infiltrations, without a safe and secure venue for networking and furthering their medical education.

Defendants, in contrast, are arguing for a public policy that would allow radicals to commit fraud and multiple other criminal acts (including tax fraud) in order to infiltrate organizations of abortion providers to reveal to the public "a disturbingly callous attitude toward highly developed human fetuses." (Opp'n at 52.) It would encourage the kind of odious behavior proven here, where individuals falsely represent themselves, wear wires and [redacted] And this entire argument is based on Defendants' self-serving characterization of a sum total of seven clips cherry-picked from 504 hours of illegal tape taken at NAF's meetings. (Mot. at 14-15 and materials cited therein.) Defendants' ideological commitment to their cause, their fanatical animus toward Planned Parenthood, and their moral outrage at the fact that abortion is legal in this country does not give them the right to disregard the law.

Last, the whole point of NAF's confidentiality agreements is to create a safe space for NAF members to come together, and to mingle and communicate freely in "moments of great candor" (Opp'n at 52) without fear of being infiltrated and misrepresented by the Troy Newmans and David Daleidens of this world. (Saporta Decl., Dkt. No. 3-34 ¶ 16 (quoting meeting attendee as saying "It is great to be in a place where I can say 'abortion' out loud and be supported.").) Physicians have clinical jobs and they speak in clinical terms. A gathering of cardiologists or gastroentologists discussing medical procedures at a conference would sound no different, but because of the subject matter, NAF members, who sacrifice their own privacy and safety every day in order to care for their patients, are derided by these Defendants as "callous." Defendants' galling, offensive and shameful argument may find traction with a different audience, but provides no legal basis to void NAF's agreements.

b. Defendants' Claim That the Agreements Are Invalid Agreements to Suppress Evidence of Crime Is Legally and Factually Baseless.

Defendants' only other argument is that the agreements are unenforceable "to the extent" that they would "prevent disclosure of criminal activity" or a "willingness to engage in criminal activity." (Opp'n at 52.)

This claim has no legal basis. The cases Defendants cite address clearly illegal agreements, are not remotely on point, and require no response.[6] There is nothing against "public policy" about NAF's confidentiality agreements. *See, e.g., Vringo, Inc. v. ZTE Corp*., No. 14-4988, 2015 WL 3498634, at *8 (S.D.N.Y. June 3, 2015) (rejecting argument that NDA was "an agreement to suppress evidence" where NDA contemplated receipt of subpoenas, and required notice and efforts to obtain confidential treatment in response to such subpoenas). It is simply not credible to argue that they are agreements to suppress evidence within the meaning of the cases Defendants rely on.

More importantly, this argument has no evidentiary support. The only "evidence" submitted is the declaration of David Daleiden, together with 21 audio/video clips taken from NAF's meetings. In his declaration, Daleiden states that CMP "carries out its work by means of investigative journalism that complies with all applicable laws." (Decl. of David Daleiden in Opp'n to Mot. for Prelim. Inj. (Dkt. No. 265-3) ("Daleiden Decl.") ¶ 2.) He avers that his "work" has been informed by conversations with (unidentified) "attorneys" and (unidentified) "scientists, researchers, abortion providers" and "procurement specialists, among others." (*Id*. ¶¶ 6, 12.) He also states that "in addition to [his] own reading and research, [he] consulted with attorneys on various legal issues," including "the legality, or lack thereof, of the abortion and fetal tissue procurement practices I learned about." (*Id*. ¶ 7.)

Daleiden then states that Biomax agents told NAF representatives that "BioMax planned to give clinics some of the fees that it received from researchers for providing fetal tissue—***an***

[6] *See, e.g.*, *Fomby-Denson v. Dep't of the Army*, 247 F.3d 1366, 1378 (Fed. Cir. 2001) (settlement agreement precluding reporting of forged documents void); *Lachman v. Sperry-Sun Well Surveying Co.*, 457 F.2d 850, 853 (10th Cir. 1972) (agreement prohibiting disclosure of unlawful misappropriation of natural gas void under the circumstances).

action that would be plainly illegal." (*Id.* ¶ 10 emphasis added).) This is so, he claims, because "there is usually no cost to the abortion provider," so "no reimbursement is allowed by law." (*Id.* ¶ 14.) Then, when Daleiden attended NAF's meetings, he "took every opportunity" to describe this "plainly illegal" "business model," and "at no time did any industry participants raise concerns about BioMax's stated business plan." (*Id.* ¶ 14.) To the contrary, "most attendees, including NAF personnel, appeared to welcome BioMax's presence at the conference." (*Id.*) He had "many conversations with NAF attendees and personnel about paying abortion providers $50, $60, or more for desired fetal tissue specimens." (*Id.*)

In sum, Defendants' entire argument boils down to the assertion that NAF is preventing "disclosure of criminal activity" because David Daleiden says criminal activity is afoot. Daleiden's declaration of conclusory legal assertions has no evidentiary value, and is entitled to no weight whatsoever.[7] *Oakland Tribune, Inc. v. Chronicle Pub. Co., Inc.*, 762 F.2d 1374, 1377 (9th Cir. 1985) (affirming trial court's decision to disregard "conclusory" declarations and holding on preliminary injunction that the "weight to be given each [affiant's] statement is in the discretion of the trial court"); *Bischoff v. Brittain*, No. 14-01970, 2014 WL 5106991, at *3 (E.D. Cal. Oct. 10, 2014) ("[T]he weight to be given such evidence is a matter for the court's discretion, upon consideration of the competence, personal knowledge and credibility of the affiant.") (internal quotation marks omitted). In *StemExpress LLC v. Center for Medical Progress et al.*, LA Super. Ct. No. BC589143 (Aug. 21, 2015), for example, the Los Angeles Superior Court held that Daleiden's testimony was not "worthy of credence," and that his "apparent ideological conviction" does not establish a "reasonable belief" of evidence of a crime under Penal Code § 632. (Supp. App'x Ex. No. 134 at 8.) If Daleiden's "apparent ideological conviction" does not establish a "reasonable belief" of evidence of a crime in the LA Superior Court action (*id.*), it most certainly does not establish that NAF's confidentiality agreements seek to suppress evidence of a crime in this case. There are multiple reasons why this is so.

[7] Like Daleiden's declaration, Defendants' brief simply rests on conclusory assertions that Daleiden uncovered "criminal behavior." (Opp'n at 1-2, 3, 16-17, 37, 49, 50-51, 52-54.)

First, Daleiden's statements about what is "illegal" do not constitute evidence of anything. *See* Civil Local Rule 7-5(b) (a declaration "may contain only facts . . . and must avoid conclusions and argument"); *Evangelista v. Inlandboatmen's Union of Pac.*, 777 F.2d 1390, 1398 fn. 3 (9th Cir. 1985) (lay witness declarations containing "legal conclusion[s]" are "inadmissible"); *Zoom Elec., Inc. v. Int'l Broth. Of Elec. Workers, Local 595*, 2013 WL 192515, at *4 (N.D. Cal. Jan. 17, 2013) (striking declaration "that consist of legal conclusions and argument, in violation of Civil Local Rule 7-5").

Nevertheless, it is worth noting that Daleiden gets the law completely wrong. The National Institutes of Health Revitalization Act of 1993 expressly allows a woman to consent to donating fetal tissue after an abortion. *See* 42 U.S.C. § 289g-1(a)(1) ("The Secretary [of Health] may conduct or support research on the transplantation of human fetal tissue for therapeutic purposes"); *id.* § 289g-1(a)(2) ("Human fetal tissue may be used in research . . . regardless of whether the tissue is obtained pursuant to a spontaneous or induced abortion . . . ."). Clinics who offer this option to their patients are entitled under the law to recoup "reasonable payments" for the service "associated with the transportation, implantation, processing, preservation, quality control, or storage of human fetal tissue." *Id.* § 289g-2(e)(4).[8]

Thus Daleiden's bald assertion that a "business model" allowing a tissue procurement company "to give clinics some of the fees that it received from researchers for providing fetal tissue" is "plainly illegal" (Daleiden Decl. ¶ 10) ignores the fact that clinics are entitled to "reasonable payments" to cover their costs. 42 U.S.C. § 289g-2(e)(4). And while he asserts that there is "usually no cost to the abortion provider" when dealing with a fetal tissue procurement company (Daleiden Decl. ¶ 14), he provides no support of any kind for this statement; he simply asserts it. Nor does he explain how his conclusory contention makes sense: Procurement

[8] NAF's Guidelines Relating to Fetal Tissue Donation reflect these requirements. (App'x Ex. 110 at 2 ("Clinics and providers cannot financially gain from their participation in fetal tissue donation. Remuneration is limited to 'reasonable payments associated'" with costs). So does the guidance Planned Parenthood provides to its affiliates. (App'x Ex. 78 at 6 (clinics only allowed to be "reimburse[d] for actual expenses (e.g., storage, processing, transportation etc.) of the tissue").)

organizations are not on hand every minute of every day to collect tissue, and tissue must be stored correctly and clinic staff diverted to deal with the procurement organization. (*See, e.g.*, App'x Ex. 78 at 7 ($60 reimbursement fee received by affiliates in California covered "only their costs, as allowed under federal law").) All of Daleiden's other assertions about supposed evidence of criminal conduct flow from his *ipse dixit* that a "business model" offering clinics "$50, $60, or more" is "plainly illegal." (Daleiden Decl. ¶¶ 10, 14.) This simply is not so.

Second, largely for the reasons explained above, Defendants do not point to a shred of evidence in the 21 cited audio/video clips in support of their claim that NAF's members evidenced "willingness to engage in criminal activity." (Opp'n at 52.)[9]

NAF will not dignify Defendants' continued smear campaign in court filings with a point-by-point response, except to say that this handful of clips simply show more of the same. [redacted] Nor is there the requisite foundation for showing that any of these individuals knew anything about federal requirements regarding fetal tissue procurement. Why would they? Only a handful of Planned Parenthood affiliates (less than 1%) had fetal tissue programs. (App'x Ex. 78 at 6.) [redacted] There are countless other examples in the record that Defendants fail to address. (*See* Mot. at 10 n.5.)

Third, Daleiden has no credibility when he accuses lawful providers of abortion care of

[9] To put Defendants' citations in context, the "many conversations" of "criminal activity" (Daleiden Decl. ¶¶ 12, 14) cited by Defendants amount to ***0.69% of the 504 hours of tapes taken at NAF's meetings*** (based on the times set forth in Defendants' exhibits.)

being criminals. Not only [redacted] but he has openly boasted about committing fraud on NAF and its members, and has admitted to illegally taping 504 hours of NAF's meetings. (*See* Supp. App'x Ex. 134 at 7 (disregarding Daleiden's testimony because of "admission" that he "surreptitiously taped" individuals).) Daleiden also has stated under penalty of perjury to the United States government and the State of California that CMP was a "nonpartisan" organization and that "no substantial part of the activities of the Corporation . . . consist of carrying on propaganda, or otherwise attempting to influence legislation." (App'x Exs. 9 at NAF0000535; 10 at NAF0001789.)

We now know these claims are false. [redacted] In even more vivid terms, CMP's agent, Catherine Short, issued a press release on July 14 calling abortion doctors "contract killers" and expressly asking "why a penny of taxpayer money is going to fund any part of Planned Parenthood." (App'x Exs. 24; 25 at NAF0002011.) And Troy Newman recently stated that Defendants' goal all along was to "completely destroy the entity called Planned Parenthood." (Supp. App'x Ex. 136.) Far from seeking evidence of actual crimes, Defendants' motives are plain as day.

[10] This report was produced to NAF not by CMP or Daleiden, but rather by his friend Charles C. Johnson. Daleiden's attorneys quickly designated it Confidential under the Protective Order.

Fourth, Daleiden exclusively bases his views concerning "the legality, or lack thereof, of the abortion and fetal tissue procurement practices [he] learned about" on his "own reading and research" and consultations with "attorneys on various legal issues," as well as "experts." (Daleiden Decl. ¶¶ 7, 6.) Conspicuously, Daleiden does not identify a single "expert" or attorney that he relied upon. The Court should disregard Daleiden's claimed expertise for this reason alone. But NAF now knows the identities of individuals who were "intimately involved in the planning and funding of [CMP's] alleged conspiracy," [redacted] *Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, Case No. 15-17318 (9th Cir. Dec. 3, 2015). [redacted] Daleiden also consulted with Theresa Deisher (Supp. App'x Ex. 149 ¶¶ 6-12), a well-known anti-vaccination advocate whose work has been rejected by courts because of "her own lack of demonstrated scientific research." *Mostovoy v. Sec'y of HHS*, No. 02-10V, 2013 WL 3368236 (Fed. Cl. June 12, 2013). The sources for Daleiden's knowledge of "the abortion and fetal tissue procurement practices" that he was "investigating" speak volumes about his credibility and qualifications.

Fifth and finally, Daleiden's claim that his videotaping campaign has uncovered evidence of criminal practices has been thoroughly debunked. While he continues to insist that statements by Dr. Deborah Nucatola, [redacted], featured in the very

first video he released "contain[] statements . . . reflecting a clear willingness to profit from the sale of fetal tissue" and who "admitt[ed] to alteration of abortion methods to procure fetal tissue" (Opp'n at 16), not a single state has found any wrongdoing on the part of Dr. Nucatola or Planned Parenthood. To the contrary, nine states have concluded investigations of Planned Parenthood, finding no basis for wrongdoing (not to mention the many states that declined to investigate Planned Parenthood in the first place). (App'x Exs. 112; 116; 118; 119; 122; 123; *see also* Supp. App'x Exs. 140; 141; 143.) The Washington AG's findings are especially instructive, because Washington is only one of two states in which Planned Parenthood affiliates were actually involved in fetal tissue donation programs. (App'x Ex. 78 at NAF0001864.) The Washington AG found "no indication that procedures performed by Planned Parenthood are anything other than performance of a legally authorized medical procedure." (Supp. App'x Ex. 141 at 1). To the contrary, the Washington AG found that Planned Parenthood does not "sell fetal tissue," nor does it "perform partial-birth abortions." (*Id.*) CMP responded by calling for the Attorney General to be impeached. (Dkt. No. 263-4 at 1.)

Daleiden's false and self-serving claims that the confidentiality agreements seek to suppress evidence of criminal conduct provide no grounds to void NAF's contracts.

B. NAF Is Likely to Succeed on the Merits of Its Penal Code § 632 Claims.

In its opening brief, NAF also established that it was likely to succeed on the merits of its Penal Code § 632 claims. Specifically, under the California Supreme Court's decision in *Sanders*, individuals in a "workplace to which the general public does not have unfettered access" enjoy a legitimate "expectation that their conversations and other interactions will not be secretly videotaped by undercover television reporters." *Sanders v. Am. Broadcasting Cos.*, 20 Cal. 4th 907, 911 (1999). Here, given the history of violence and attempted infiltrations of NAF's meetings, the Exhibitor Agreements and NDAs, the other prerequisites for gaining access to NAF's meetings, and the extensive security measures in place, NAF's members had a legitimate, objectively reasonably expectation that they would not be secretly recorded by those opposed to the lawful provision of abortion care while in the safe haven of NAF's meetings. *See id.* The sweeping and indiscriminate nature of Defendants' videotaping campaign speaks for itself in this

regard.

First, Defendants' claim that section 632 does not support a request to enjoin the publication of tapes taken in violation of that provision is irrelevant. NAF's Exhibitor Agreements and NDAs support NAF's request to enjoin the publication of those tapes. But section 632 supplements NAF's request to enjoin Defendants from *future* violations of that provision, and from "attempting to gain access to any future NAF meetings" in order to tape its members. *See* Cal. Penal Code § 637.2 (b) (any person may "bring an action to enjoin and restrain any violation of" the chapter containing California Penal Code section 632). That request is especially critical in light of Defendants' admitted record, and extensive history, of making surreptitious recordings of abortion providers. (*See, e.g.* App'x Exs. 18; 19 at NAF0003563, NAF0003585-86; 20.) Indeed, in their Opposition, Defendants expressly reserve the right to invade NAF's meetings in the future, claiming NAF has no "special privilege" to avoid "further investigative journalist projects by Defendants or someone acting in concert with them." (Opp'n at 59.) By their own admission, Defendants will not be deterred absent an injunction.

Second, Defendants argue that NAF has failed to prove any "confidential communications" occurred at its meetings, because meeting attendees should have expected their communications to be "overheard" by "another attendee or venue staff." (Opp'n at 29-31.) This argument runs headlong into the California Supreme Court's holding in *Sanders*, which squarely rejected the notion that a reasonable expectation of privacy "must be of ***absolute*** or ***complete*** privacy." 20 Cal. 4th at 915, 917-18 (original emphases).[11] *Sanders* considered secret recordings made of people in "a large room with rows of cubicles, about 100 total," each of which was only "enclosed on three sides by five-foot-high partitions," in an office that "was unlocked during

[11] Defendants also argue that *Sanders*'s analysis does not apply because it addressed an invasion of privacy claim rather than a claim under section 632. This is an irrelevant distinction because the "reasonable expectation of privacy" analysis is the same whether in the context of an invasion claim or a Penal Code § 632 claim. *See, e.g.*, *Kight v. CashCall, Inc.*, 200 Cal. App. 4th 1377 (2011) (applying *Sanders*' reasonable expectation of privacy analysis to a Section 632 claim); *Lieberman v. KCOP Television, Inc.*, 110 Cal. App. 4th 156, 168 (2003) (same). The other cases Defendants rely on in their argument are from other jurisdictions and are irrelevant.

business hours." *Id*. at 912. Occupants could "easily overhear conversations conducted in surrounding cubicles or in the aisles . . . ." *Id*. Nevertheless, because privacy "is not a binary, all-or-nothing characteristic," the court ruled that the occupants "have a reasonable expectation of visual or aural privacy against electronic intrusion by a stranger to the workplace, despite the possibility that the conversations and interactions at issue could be witnessed by coworkers or the employer." *Id*. at 918. Similarly, the *Sanders* court brushed off the Defendants' proposed distinction between "personal" and "professional" conversations (Opp'n at 32), because what mattered was that the recorded conversations "could not have been witnessed by the general public, although they could have been overheard or observed by other employees in the shared workplace." *Id*. at 922; *see also Flanagan v. Flanagan*, 27 Cal. 4th 766, 774 (2002) (remanding ruling in favor of defendant, and because section 632 claims turn on whether a plaintiff has an "objectively reasonable expectation that they were not being recorded").

Of particular importance here is the principle that the existence of a privacy expectation "must be evaluated with respect to the identity of the alleged intruder and the nature of the intrusion." *Sanders*, 20 Cal. 4th at 918. Here, NAF meeting attendees knew that NAF went to great lengths to vet attendees as to the nature of their business, to secure multiple layers of confidentiality agreements, to make sure that the meetings were not being filmed, photographed or recorded, to ensure physical security, to work with hotel staff to make sure that the premises were secure, and to keep the contents of the meetings confidential with respect to the general public. (*See* Dkt. No. 228-4 at 3-6.) Defendants cannot seriously argue that attendees did not hold an objectively reasonable expectation that anti-abortion extremists (or other analogs to "stranger[s] to the workplace," *Sanders*, 20 Cal.th at 918) would not be recording or listening in on their conversations.[12]

[12] Separately, Troy Newman claims NAF is not likely to succeed on the merits of its claims against him "as an individual defendant," and argues that NAF should dismiss such claims "as a needless redundancy." (Opp'n at 38-43.) As an officer of CMP, Newman is automatically bound by any injunction that issues against it by virtue of Federal Rule of Civil Procedure 65(d)(2). (App'x Ex. 9 at 3 (listing Troy Newman as CMP's Secretary).) Newman offers no basis to argue that NAF must establish "stand alone" grounds in order to bind him to the injunction. And his claim that there is "no evidence" to support claims against him is not serious in light of his

(Footnote continues on next page.)

C. NAF Established a Likelihood of Irreparable Harm If Defendants Are Not Enjoined.

In its opening brief, NAF demonstrated that CMP's campaign against its members has caused significant irreparable harm to its initial victims, and that absent a preliminary injunction, its members will be subject to the same treatment. (Mot. at 11-14.) The recent leak of TRO materials by Charles Johnson demonstrates the compelling reasons why an injunction is necessary. Following his disclosures, NAF members and meeting attendees have once again had their faces widely published on the internet, while commentators call for their "names and info . . . [to go] viral" and that they be "drawn and quartered," "skinned alive," and "execut[ed]." (*Id*. at 13.)

Even more gut-wrenching, the mass shooting that took place at a NAF member clinic after NAF filed its motion vividly demonstrates the wisdom of preliminarily enjoining these Defendants from violating their confidentiality obligations to NAF. On November 28, 2015, a Colorado gunman stormed into a Planned Parenthood clinic in Colorado Springs—for which Dr. Ginde is the medical director—and engaging in a 5-hour armed standoff with police that left one police officer and two civilians dead. (Supp. App'x Ex. 145.) After his capture, the gunman echoed the precise words Defendants leveled against Dr. Ginde and the other victims of their campaign: "no more baby parts." (*Id*.) Dr. Ginde's picture, the address for the clinic that was the target of this attack, and Defendants' surreptitious videos of her are all posted on the website of Newman's organization, which they credit as the "largest collection of documents on America's abortion cartel." (App'x Ex. 22 at NAF0004426; Supp. App'x Ex. 148.) And after the murders, Newman had the gall to state that they were "exactly what [Planned Parenthood had] been hoping for" because it could now play the "poor victim." (Supp. App'x Ex. 144.) Defendants' vile comments aside, their claims that NAF has not shown a likelihood of irreparable harm are meritless.

(Footnote continued from previous page.)

multiple public statements touting his involvement in the conspiracy, and his invocation of the Fifth Amendment to avoid self-incrimination in his deposition. (*See, e.g.*, App'x Exs. 100, 127.)

First, Defendants claim that NAF's irreparable harm showing relies "virtually exclusively" on the "purported" risk of "threats, harassment, and violence by ***unrelated third parties***" which is insufficient to "constitute irreparable harm" in "the context of free speech claims." (Opp'n at 43-44 (original emphasis).)

This argument utterly ignores the overwhelming evidence presented by NAF concerning the reputational injuries suffered by the initial victims of Defendants' campaign. Reputational harm by itself is sufficient to sustain the request for injunctive relief. *Regents of Univ. of Cal. v. Am. Broad. Cos., Inc.*, 747 F.2d 511, 520 (9th Cir. 1984) (harm to reputation is irreparable injury). Moreover, many of the most repugnant accusations leveled against those victims came from the Defendants' themselves. Newman, Daleiden, and CMP's agent Catherine Short have variously described Dr. Nucatola and others as "repulsive," "satanic," "Dr. Frankenstein," and "contract killers" engaged in "baby parts trafficking," "barbaric practices," and "human rights abuses." (App'x Exs. 16 at NAF0004493, NAF0004496; 74; 75; 128; 24 at 1.)

Beyond misrepresenting NAF's position and the evidence presented, CMP's claim that threats of harassment and violence by "unrelated third parties" is insufficient "in the context of free speech claims" necessarily supposes that Defendants have a "free speech" right to illegally tape NAF's meetings and publish those tapes after-the-fact. For reasons already discussed at length, they have no such right. Defendants' reliance on "heckler's veto" cases therefore completely misses the mark.[13]

Second, Defendants argue that NAF cannot show a causal connection between Defendants' breaches and any "concrete acts of violence." (Opp'n at 44-45.) The argument has

[13] The "heckler's veto" line of cases all involve unconstitutional bans against peaceful protests that had been imposed because some bystanders were upset by the protestors' message. *Ctr. for Bio-Ethical Reform, Inc. v. Los Angeles Co. Sheriff Dep't*, 533 F.3d 780, 789 (9th Cir. 2008) (peaceful pro-life protest could not be banned because some bystanders were upset by graphic images of aborted fetuses); *Cox v. Louisiana*, 379 U.S. 536, 550 (1965) (arrest of black students peacefully protesting racial segregation could not be upheld on ground that some white citizens were angered by message); *Bacheller v. Maryland*, 397 U.S. 564, 567 (1970) (same in context of peaceful Vietnam war protests); *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (parade fees could not be imposed based on content of protestors' message); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (arrest of Ku Klux Klan member could not be upheld on ground that his speech referred to possibility of "revengeance" against black and Jewish citizens).

no legal support. *See e.g., Tompkins v. Cyr*, 995 F. Supp. 664, 687-688 (N.D. Tex. 1998) (entering injunction against anti-abortion protestors based on "substantial threat of future harm" to physician posed by third parties because "Defendants' past actions indicate that they have little or no regard for plaintiffs' rights") *aff'd in part and rev'd in part on other grounds by* 202 F.3d 770 (5th Cir. 2000); *see also Garcia v. Google, Inc.*, 786 F.3d 733, 744-46 (9th Cir. 2015) (assuming that third party death threats constitute irreparable harm). Beyond that, it ignores the multitude of death threats that specifically call out Defendants' videos as their inspiration, as well as the concrete link between Defendants' campaign and the spike in incidents of intimidation, harassment, and violence perpetrated against providers of abortion care since July 14. The notion that there is no "nexus" between Defendants' false claims of criminality and "baby parts" trafficking and the vitriol leveled at NAF's members since July 14 is not a serious argument.

Third, Defendants argue that the death threats directed against abortion providers in the wake of CMP's video campaign constitute mere "common" and "political hyperbole." (Opp'n at 44-45). The vitriolic abuse hurled at NAF's members, in the context of the history of violence, death threats, and extreme harassment that they have suffered for decades, is not so easily dismissed, and is anything but ordinary. To take just one example, in the weeks before the massacre at a clinic for which Dr. Ginde is the medical director, protesters descended on Dr. Ginde's front lawn holding signs that said "Planned Parenthood sells baby parts" and leaving fliers that said "Savita Ginde Murders Children." (App'x Ex. 84.) Online commentators publicly called for her clinic to "get[] bombed" and for "every abortion supporter" to be "publicly lynched" and "executed" like "vile subhuman cockroaches." (App'x Ex. 85.) Just a few weeks later, a Colorado gunman descended on the clinic that Newman's organization identifies as Dr. Ginde's workplace, and then repeated Defendants' credo to police after killing three people. (Supp. App'x Exs. 148; 142.) Yesterday, while he was being charged, the gunman announced to the courtroom that "I am a warrior for the babies," and "protect the babies!" (Supp. App'x Ex. 147.) Not only is the causal link obvious, these results are utterly and tragically predictable in this climate. Defendants' cynical argument requires no further response.

Fourth, and finally, Defendants claim that NAF's assertion of increased "harassment" at clinics is artificially inflated. (Opp'n at 46-47.) But Defendants ignore that not only has NAF and Planned Parenthood seen a dramatic increase in hate speech, harassment, and violence against Planned Parenthood clinics in the wake of CMP's video smear campaign (App'x Ex. 95 at 16:17-23, 39:13-20; *see also* App'x Exs. 92; 93), ***the FBI*** has reported an increase in attacks on reproductive health care facilities. (App'x Ex. 94.) Indeed, there have been at least four arsons and one massacre at Planned Parenthood clinics that have been tied to anti-abortion extremists since CMP's video campaign. (App'x. Exs. 96-99; Supp. App'x Ex. 142.)

D. The Balance of Hardships Favors Maintenance of an Injunction.

As NAF explained in its opening brief, it is an "accepted equitable principle that a court does not have to balance the equities in a case," like this one, "where the defendant's conduct has been willful." (Mot. at 23-24 (quoting *EPA v. Envt'l Waste Control, Inc.*, 917 F.2d 327, 332 (7th Cir. 1990).) Defendants do not contest this point, nor do they offer any reason why this traditional principal of equity should not apply to them. Accordingly, Defendants' cited "hardships" cannot pose a barrier to NAF's requested injunction. *See also, e.g., United States v. Marine Shale Processors*, 81 F.3d 1329, 1358-9 (5th Cir. 1996) ("a court need not balance the hardship when a defendant's conduct has been willful"); *Or. State Pub. Interest Research Group v. Pac. Coast Seafoods Co.*, 374 F. Supp. 2d 902, 908 (D. Or. 2005) (same).

Moreover, because Defendants voluntarily waived their First Amendment rights with respect to information obtained at NAF's meetings, any "harm" to their First Amendment rights is not cognizable in the Court's weighing of hardships. *DISH Network L.L.C. v. Rios*, No. 14-2549, 2015 WL 632242, at*6-7 (E.D. Cal. Feb. 13, 2015); *see also Pappan Enterprises, Inc. v. Hardee's Food Systems, Inc.*, 143 F.3d 800, 806 (3d Cir. 1998) ("self-inflicted nature of any harm suffered by" a defendant "weighs in favor of granting preliminary injunctive relief"); *Gardner Denver Drum LLC v. Goodier*, No. 06-4, 2006 WL 1005161 at *11(W.D. Ky. Apr. 2006) (issuing preliminary injunction because defendant "cannot now claim that the harm from enforcing the Covenant he agreed to would be too great a hardship on him"). Defendants therefore point to no other "harm" that might weigh in their favor.

In contrast, NAF has demonstrated time and again that it has a strong interest in enforcing its contracts and protecting its members from harassment and worse. While Defendants cavalierly dismiss this as mere "negative public attention" (Opp'n at 48), this hardly does justice to the extreme history of violence, death threats and harassment that has increased substantially since Defendants started their campaign. (*See* Part II.C, *supra*.) Defendants should not be permitted to continue making targets of NAF's members during the pendency of this litigation.[14]

E. The Public Interest Favors Maintenance of an Injunction Through Trial.

The harm to public safety that has resulted from Defendants' conduct is self-evident, and Defendants fail to rebut NAF's showing that the public interest is served by preventing the harassment and violence against NAF's members, and by enjoining the publication of recordings fraudulently obtained in violation of contract and privacy rights. (*See* Mot. at 25.)

Instead, Defendants recycle their arguments that the disclosure of the tapes would serve the public interest because the public has an "extraordinary interest" in this information. Defendants cite no authority whatsoever for the proposition that this supposed "interest"—the disclosure of illegal tapes taken in violation of confidentiality agreements that are designed to protect physicians who work to ensure the constitutional rights of women in this country—can trump the other interests that NAF has established. Whatever the public's interest in this information may or may not be, it is not as great as the public's clear interest in upholding valid and enforceable nondisclosure agreements, in deterring fraud and other criminal and civil wrongs, and in ensuring the safety and security of physicians who provide abortion services to women. (*See* Parts II.A.3.a, II.A.3.b, II.C, *supra*.)

As for the argument that NAF is trying to keep Defendants out of the "marketplace of ideas," this is emphatically not the case. Defendants can and will continue to disseminate their

[14] Defendants argue that there will be no irreparable harm because some abortion providers make the decision to keep a public profile. (Opp'n at 48.) This is an extremely personal decision, and those who make it do not do so lightly. As one publicly identified provider told a reporter : "I think we're always very aware of our surroundings as we move about the city. I think about the possibility that there's going to be a bomb in my car every time I turn the ignition. And there's a split second where I think about it. And then the car starts, and it's OK. But I – it's ever-present." (Supp. App'x Ex. 146.) Defendants presume to make this decision for all of their victims.

belief that NAF "is a criminal enterprise and a key partner in Planned Parenthood's late-term abortion and baby body parts business." (Supp. App'x Ex. 145.) They can still announce their wishes to "completely destroy" Planned Parenthood, and make vile comments about their beliefs that the "execution" of abortion providers should be legal. (Supp. App'x Ex. 144; App'x Ex. 23 at NAF00004082.) What they cannot do is release footage or information that they expressly contracted to keep confidential as a precondition for entering NAF's meetings.

F. The Preliminary Injunction Requested Is Not Vague or Overbroad.

Last, Defendants argue that the specific relief NAF seeks on Preliminary Injunction is "vague, overbroad, and not supported by the evidence or the law." (Opp'n at 56.) This argument consists of pages of meandering observations devoid of citation to legal authority. (Opp'n at 56-59.) In contrast, NAF has provided extensive evidence to support its Motion, showing that it is likely to succeed on the merits of its claims, and that if a preliminary injunction does not issue, NAF and its members would suffer irreparable harm that cannot be remedied. NAF responds to address just two points.

First, Defendants (and the Arizona AG that supports them) renew their argument that the term "third party" should be interpreted to exclude "law enforcement, state officials, Congressional committees, and similar governmental bodies." (Opp'n at 56.)

The Court has heard this argument multiple times and should reject this latest request to change its approach. NAF has never asserted that Defendants should be prohibited from providing compelled responses to lawful subpoenas issued by governmental entities. Indeed, the NDAs that NAF seeks to enforce expressly contemplate such disclosures. (*See, e.g.*, App'x Ex. 5 ¶ 4.) The Court has rejected Defendants' repeated assertion that those provisions are unenforceable, and has ordered Defendants to engage in the meet-and-confer process mandated by the contracts. (Dkt. Nos. 162 at 4-5.) *See, e.g.*, *Vringo*, 2015 WL 3498634, at *8. Moreover, NAF has designated the materials Confidential under the Court's Protective Order, which requires notice in the event that either party receives a subpoena, and gives NAF the right to "protect its confidentiality interests in the court or tribunal from which the subpoena or order issued." (Dkt. No. 92 ¶ 9.) The proposed carve out would eviscerate NAF's rights under both the NDAs and

this Court's Protective Order. (*See* Dkt. No. 112 at 8-12.)

Rather than giving these Defendants *carte blanche* to disclose whatever they want to "governmental bodies," the Court should instead maintain control and provide a process to ensure that its orders are followed. The avalanche of subpoenas boldly predicted at the outset of this case has never materialized. Just two states have subpoenas outstanding: Arizona and Louisiana.[15] As explained, enforcement officials have either refused to open investigations on the basis of Daleiden's false accusations, or they have opened and closed investigations finding no evidence of wrongdoing by Planned Parenthood or any other providers. (*See* Part II.A.3.b, *supra*.) More to the point, the meet-and-confer process is effective. For example, NAF has met and conferred directly with counsel for the Louisiana Inspector General, who informed NAF that they were only interested in investigating a discrete subject matter that implicated a fraction of the 504 hours. (Rebuttal Decl. of D. Foran in Supp. of NAF's Reply in Supp. of Its Mot. for Prelim. Inj. ¶ 18.) This is in stark contrast to the position taken by counsel for David Daleiden, who stated (after interjecting himself into a meet and confer that NAF sought to initiate with counsel for CMP) that "all" 504 hours of recordings were responsive to the Louisiana subpoena. (*Id*.)

The Arizona AG's brief simply recycles arguments the Court has considered already in connection with the TRO. The only new element in Arizona's argument is the extraordinary assertion that NAF should be granted no injunction whatsoever. (Dkt. No. 285 at 15.) Arizona's claim that NAF has "not shown the required likelihood of irreparable harm" in order to prevent "disclosures to law enforcement agencies," and is otherwise against the "public interest" (Dkt. No. 285 at 10-15) utterly ignores the recent fiasco surrounding Daleiden's disclosure to Congress and the subsequent "leak" to his "great friend" Charles C. Johnson of those materials, ***which resulted directly in irreparable harm to NAF's members***. (Mot. at 13.) And if Arizona really believes, contrary to its own laws,[16] that it is entitled to hundreds of hours of sensitive materials

[15] None of the other amici joining in Arizona's brief (Alabama, Arkansas, Michigan, Montana, Nebraska, and Oklahoma), have issued subpoenas to CMP.

[16] *See People ex rel. Babbitt v. Herndon*, 581 P.2d 688, 690 (Ariz. 1978) (civil subpoenas "not within the agency's scope of authority" are "odious and oppressive and should not be tolerated by law"); *State ex rel. Corbin v. Goodrich*, 151 Ariz. 118, 122, 124 (Ariz. Ct. App. 1986) (Consumer

(Footnote continues on next page.)

covered by the Court's TRO without regard to "relevance" to any lawful investigation (Dkt. No. 285 at 9), NAF will contest this amazing claim in the appropriate venue. That is precisely how the process set forth in the NDAs and Protective Order is intended to work. The Court should order Defendants to continue to abide by their obligations.

Second, Defendants argue that they should be free to publish videos of individuals that they first met at NAF's meetings and followed up with afterwards. In light of the evidence adduced in discovery, NAF's Motion seeks to expand the TRO order to enjoin Defendants and those acting in concert with them from publishing tapes of "recordings taken of members or attendees Defendants first made contact with at NAF meetings." (Mot. at 2.) Defendants' arguments that NAF lacks standing to make this request, and that "the contracts provide no basis" for such a term are meritless. (Opp'n at 58.)

Of course NAF has standing to enforce its own contracts, even if those contracts were entered into for the benefit of third parties. Restatement (Second) of Contracts § 307, cmt. b ("Even though a contract creates a duty to a beneficiary, the promisee has a right to performance."). And Defendants' claim that there is "no basis" in the contracts for this request is simply wrong. The Exhibitor Agreements and NDAs expressly limit the "use" of information obtained at NAF's meetings. (*See*, *e.g.*, App'x Ex. 3 at 2 ¶ 17 (information "will be used solely in conjunction with Exhibitor's business"); 5 at 2 ("Attendees may not use NAF Conference Information in any manner inconsistent with these purposes.").

(Footnote continued from previous page.)

Fraud Act only reaches acts "committed within Arizona in violation of its provisions"); *Marsh v. Zaazoom Solutions, LLC*, No. 11-05226, 2012 WL 952226, at *16 (N.D. Cal. Mar. 20, 2012) (dismissing Consumer Fraud Act claim because plaintiff "failed to identify any connection between Arizona" and the claims).

[redacted], made possible only by the "use" of information obtained at NAF's meetings. NAF's evidence also shows that Defendants leveraged NAF's meetings to gain access to abortion providers, because they were [redacted]. The follow-on sting operations that resulted in the vicious smear campaigns against Dr. Nucatola and StemExpress's CEO were possible, in Daleiden's own words, because "we've been at NAF" and "we're so vetted." (*See* Mot. at 11.) Because the contracts prohibit Defendants from misusing information learned at its meetings for Defendants' wrongful purposes, the Court should enjoin any further such publications.

G. The Court Should Overrule Defendants' Objections to NAF's Evidence.

Separate and apart from its 60-page opposition (in response to a 25-page Motion), Defendants also filed twenty-nine pages of evidentiary objections. The Court should disregard these for several reasons.

First, Defendants have failed to comply with this Court's Local Rules, which require that "evidentiary or procedural objections to the motion must be contained within the brief or memorandum." *See* Civil Local Rule 7-3(a). By ignoring the Local Rules, Defendants have effectively filed a 90-page brief. Courts in this district routinely disregard evidentiary objections on this basis. *See, e.g.*, *Kyles v. Baker*, 72 F. Supp. 3d 1021, 1033 n.3 (N.D. Cal. 2014) (Orrick, J.) (overruling objections filed in "plain violation" of Local Rules); *Hennighan v. Insphere Ins. Solutions, Inc.*, 38 F. Supp. 3d 1083, 1095 (N.D. Cal. 2014) (Orrick, J.) (same).

Second, Defendants' objections ignore the fact that NAF's Motion is overwhelmingly based on competent and admissible evidence in support of its claims. That evidence (much of which Defendants repeatedly hid behind a "shell game" with the Court, followed by multiple "emergency" applications to the Ninth Circuit and the Supreme Court to stay this Court's discovery orders) includes the 504 hours of video/audio illegally obtained at NAF's meetings, David Daleiden's sworn testimony, and CMP's own internal reports and emails showing its true criminal intent. As to this core evidence, Defendants largely say nothing.

Third, Defendants' objections fundamentally misconstrue the evidentiary standard at the preliminary injunction stage. A "preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Thus, it is well-settled that a district court may "consider hearsay in deciding whether to issue a preliminary injunction." *Johnson v. Couturier*, 572 F.3d 1067, 1083 (9th Cir. 2009) (affirming grant of preliminary injunction based in part on hearsay evidence). The Ninth Circuit has expressly held that hearsay evidence is properly admitted "when to do so serves the purpose of preventing irreparable harm before trial." *Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984). Accordingly, federal courts routinely consider evidence that would otherwise by inadmissible at trial in ruling on a preliminary injunction motion. *See, e.g.*, *DMC Closure Aversion Comm. v. Goia*, No. 14-03636, 2014 WL 4446831, at *6 n.7 (N.D. Cal. Aug. 29, 2014) (Orrick, J.) (considering hearsay evidence on preliminary injunction). Defendants' objections should be overruled.[17]

H. Defendants Are Barred by Statute From Introducing Recordings Obtained at NAF's Meetings.

Ironically, while Defendants complain about NAF's evidence, the main evidence that Defendants submitted (apart from Daleiden's declaration) are the 28 video and audio clips illegally obtained at NAF's meetings, all of which are inadmissible.

Defendants are statutorily barred from introducing those clips as evidence. Under California Penal Code § 632, "no evidence obtained as a result of . . . recording a confidential communication in violation of this section shall be admissible in any judicial . . . proceeding" except "as proof in an action or prosecution for violation of this section." The same strict evidentiary bar applies to Maryland's statute. *See* Md. Code Ann., Cts. & Jud. Proc. § 10-405; *Standiford v. Standiford*, 89 Md. App. 326, 346, 598 A.2d 495, 505 (1991) (tapes obtained in

[17] As to Defendants' objection that the declaration of undersigned counsel did not comply with 28 U.S.C. § 1746, that was an inadvertent error which has now been corrected by resubmitting the declaration. *See Bd. of Trs. of the Leland Stanford Junior Univ. v. Chi-Yi*, No. 13-04383, 2015 WL 5158749, at *4 (N.D. Cal. Sept. 2, 2015) (allowing party to remedy technical 28 U.S.C. § 1746 defect in attorney declaration on reply).

violation of Maryland statute may only be "introduced in evidence for the narrow purpose of proving a violation of the Act in such a civil action"). These evidentiary bars apply in federal court to claims arising under state law. *See Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 667 (9th Cir. 2003) (Section 632's evidentiary bar is an "integral component of California's substantive state policy of protecting the privacy of its citizens, and it's properly characterized as substantive law within the meaning of *Erie*").

Moreover, the illegal videos were obtained in violation of the federal wiretapping statute, and for that separate reason Defendants are barred from relying on them. *See* 18 U.S.C. § 2515 ("no part of the contents" of any communication which if disclosed would violate 18 U.S.C. § 2511 "may be received in evidence in any trial, hearing, or other proceeding in or before any court"); Dkt. No. 131 ¶¶ 162-169 (asserting claims for violation of federal wiretapping statute, 18 U.S.C. § 2511 *et seq.*). These are statutory bars on admissibility, and they preclude Defendants' use of this evidence in any judicial proceeding.

III. CONCLUSION

For the foregoing reasons, NAF respectfully requests that the Court grant in full NAF's Motion for Preliminary Injunction.[18]

Dated: December 10, 2015

MORRISON & FOERSTER LLP

By: */s/ Derek F. Foran*
Derek F. Foran

Attorneys for Plaintiff
NATIONAL ABORTION FEDERATION

[18] Defendants did not "ask the court to set a bond or submit any evidence as to what damages [they] might incur as a result of the injunction," so the Court need not set a bond. *Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 882 (9th Cir. 2003).